

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
United Communications Corporation)	
KEYC-TV (Fac. ID No. 68853))	
Mankato, Minnesota)	CSR-8920-N
)	Docket 16-54
Petition for Waiver of Sections 76.92(f))	
and 76.106(a) of the Commission's Rules)	
)	
To: Chief, Media Bureau)	

**CONSOLIDATED REPLY TO OPPOSITIONS
TO PETITION FOR SPECIAL RELIEF**

United Communications Corporation (“UCC”) hereby replies to the oppositions filed by CBS Broadcasting, Inc., Fox Television Stations, and New Ulm Telecom, Inc. (“NU Telecom”) in the above matter.¹ The arguments set forth in the oppositions can be grouped under three headings: (I) Number of In-tab Households Used in the Nielsen Studies; (II) Meaning of ‘Network Station,’ and (III) Financial or Technical Implications of Compliance.

I. Number of In-tab Households Used in the Nielsen Studies

A. *Number of Diaries per Survey.* CBS criticizes UCC’s showing because “[f]ive of the Nielsen survey periods cited by United rely on viewing data from only one in-tab household.” The communities and viewing periods in question are: Amboy (zip code 56010) for February and November 2013; Good Thunder (zip code 56037) for February 2013 and February 2014, and Hanska (zip code 56041) for November 2013. CBS Opposition at 2 and n. 2; Fox Opposition at 3 and n.6; NU Telecom Opposition at 2.

As to Good Thunder, there are data from at least one in-tab household for each survey period. The first survey period in 2013 returned viewing data for one in-tab household and

¹ This Reply is timely for the reasons given in UCC’s motion for extension of time of March 24, 2016.

the second survey period in 2013 returned data for two households. The results were then combined by Nielsen to calculate an average.

CBS argues that this quantum of data is inadequate. NU Telecom makes the same claim with respect to viewership of KMSP-TV in zip code 56073. NU Telecom Opposition at 2. These views are incorrect. In *Gulf-California Broadcast Co. and Journal Broadcast Corp.*, 26 FCC Rcd 15027 (2011) the FCC stated:

We allow petitioners to combine two survey periods and provide average audience statistics over the two periods to increase the sample size and the reliability of the estimates Because we allow petitioners to combine surveys, **the fact that an average cannot be calculated for an individual survey period due to its results being based on only one in-tab household is irrelevant. We look at the average audience statistics from the combination of the two survey periods, combining in-tab households and audience levels.** Thus, while the sample is minimal in this case, an average can be calculated and the sample meets the requirements of the rules. *Id.* at ¶ 19 (bolding added).²

CBS objects that this standard permits significantly-viewed analyses to be “based on the thinnest of evidence.” CBS Opposition at 2. However, the real-world validity of UCC’s claim that WCCO-TV is not significantly viewed over-the-air in the named communities is easy to verify. The staff need only consult its own engineering database in this regard. As one would expect due to the great distances between these communities and the transmitter sites of the Twin Cities stations, the database plainly reveals that WCCO-TV is not viewable over-the-air in Amboy, Good Thunder or Hanska. This may be confirmed simply by visiting

² See also, *Tribune Television Company*, 24 FCC Rcd 1622, 1625 ¶6 (MB 2009); *Delmarva Broadcast Service General Partnership*, 14 FCC Rcd 10509 (1999) (“[S]ince significantly viewed status is a measure of the viewing patterns of noncable homes, the required calculation of standard error and its use along with the sample results assures that the survey results are representative of actual viewing levels in noncable homes and are not unreasonably skewed by any small sample size”). Generally, the FCC gives “much leeway” with respect to the size of the survey samples because “the standard error takes [this] into account when the variability of the estimate is calculated.” *KSTC-TV, LLC*, DA 10-1151, rel. June 24, 2010, at ¶ 13. The standard error creates a confidence interval around the reported statistic and for this reason the Commission consistently grants waivers of the Significantly-viewed Exception based on two or more Nielsen in-tab households. In the present case this threshold has been met and in most instances far exceeded, as the data in UCC’s tables reflect.

<http://transition.fcc.gov/mb/engineering/dtvmaps/> and entering the name of the community. In each town, the *only* viewable signal is that of KEYC-TV. WCCO-TV and KMSP-TV either have “no signal” or are not even listed.

The calculations contained in the FCC’s engineering data base are a product of the Individual Location Longley-Rice Model the Commission adopted³ in *Establishment of a Model for Predicting Digital Broadcast Television Field Strength Received at Individual Locations*, Report and Order and Further Notice of Proposed Rulemaking, FCC 10-194, released November 23, 2010. The approved signal intensity standard specifies the threshold level of signal strength at which digital television service is deemed to be available for reception off-the-air. When a signal’s strength is above that level, service is considered available; when it is below that level it is considered not available. In both of the communities challenged by CBS, the signal strength of WCCO-TV is so far below the threshold level for over-the-air reception that WCCO-TV does not even appear in the red-shaded category denominated ‘no signal’ in the Engineering Division’s DTV reception maps.

A logical premise of any argument that over-the-air viewing in a given community is ‘significant’ is that there exists in the first instance the technical plausibility of reception of a viewable signal over-the-air in that community. This precept derives from the D.C. Circuit’s decision in *KCST-TV, Inc.*, 699 F.2d 1185 (1983), setting aside the Commission’s denial of a request for waiver of the significantly viewed rule. At the time, the FCC’s approach to waiver requests required a petitioner to demonstrate that application of the rule was causing economic harm to the petitioning station. Absent that showing, the Commission declined to consider evidence that the distant station was not, in fact, significantly viewed.

Because the Court of Appeals viewed this approach as a violation of logic and arbitrary by definition, and the Court reversed the FCC’s action. The requirement of economic harm, said the Court, had “no logical application” in the face of evidence that the distant station was not significantly viewed. Because the question of significant viewing was logically prior to the question of economic harm, the Court could find “no apparent policy

³ Or “re-adopted” -- the FCC used the Longley-Rice Model in the analog setting for many years.

basis for requiring a showing of economic impact before considering evidence of lack of significant viewing,” and concluded that “the Commission acted arbitrarily. . . .” *Id.* at 1189.

Precisely the same type of analysis applies here. The question whether direct *any* over-the-air viewing of WCCO-TV is occurring in the subject communities is logically prior to the question whether the station is “significantly” viewed in those communities. That likelihood is nil, as the FCC’s engineering data base makes clear.

Notably, the reporting of *any* over-the-air viewing of WCCO-TV in the Nielsen data obviously stems from the extension of WCCO-TV’s signal to far-flung locales by translators such as the repeater at St. James, Minnesota. It is well established, however, that translator viewing is not an allowed component of significantly-viewed showings. *Taft Television and Radio Co., Inc.*, 103 FCC 2d 883, ¶ 7 (1986); *Scranton Broadcasters, Inc.*, 88 FCC 2d 1482, ¶ 10 (1982).⁴

B. *Zero-Diary Survey Periods.* CBS attacks the Nielsen reports which reflect zero diaries returned in one reporting period for each of two very small communities (Amboy-56010 and Hanska-56041). On this basis, CBS argues that an “average” viewing level cannot be calculated. In the abstract, this proposition may seem sound. However, the factual context of *WISN Hearst-Argyle Television, Inc.*, 26 FCC Rcd 4044 (MB 2011), the case WCCO-TV principally invokes on this score, reflects the importance of the epistemics at work in the Bureau’s decision. In that case, questions arose as to the reliability of the reported averages for the combined sweep periods in each of the two years submitted by the petitioning (Milwaukee) station. In the Bureau’s view, the disparity in the separate results – showing differences from sweep period to sweep period – lent credence to the distant

⁴ The FCC’s original 1972 significantly viewed survey included over-the-air viewing via translators. It relied on audience survey data that did not differentiate between direct viewing and viewing via translator, and this nationwide undertaking was too massive in scope to admit of such refinements. In subsequent years, though, television licensees petitioning to be added to the Significantly Viewed List have predicated their statistical showings on data that included translator coverage, urging acceptance because viewership from translators had been part of the Commission’s original survey. The FCC repeatedly has rejected this claim. See, e.g., *KOIN-TV, Inc.*, *supra*; in addition to *Taft Television and Radio Co., Inc.*, 103 FCC 2d 883 (1986) and *Scranton Broadcasters, Inc.*, 88 FCC 2d 1482 (1982).

(Chicago) station's claim that it remained significantly viewed. In several ratings periods, the Chicago station was reported to have substantial viewing in non-cable, non-ADS homes. This was to be expected given that the subject community (Racine, Wisconsin) is less than 60 miles from the Chicago station's antenna atop the Willis (Sears) tower, where it broadcast with substantially greater antenna height than those of WCCO-TV and KMSP-TV.

The same logic can be applied in the present case. CBS's objection could only have merit if one were to assume that, had diaries been returned for the one period in question in each of Amboy and Hanska, the results would have reflected viewership levels sufficient to produce an average that would cross the significant-viewing threshold. But that counterfactual would have been strikingly "anomalous" – as the actual Nielsen data for viewing of WCCO-TV in non-cable, non-ADS homes in Amboy and Hanska make obvious:

Geography Grouping	Results	Feb 13	Nov 13	Feb 14	May 14
56010 Amboy	Number of Intabs	1	1	0	2
	Avg Weekly Cume	0.00	0.00		0.00
	Cume Std Error	0.00	0.00		0.00
	Share	0.00	0.00		0.00
	Share Std Error	-	-	-	0.00

Geography Grouping	Results	Feb 13	Nov 13	Feb 14	May 14
56041 Hanska	Number of Intabs	3	1	2	0
	Avg Weekly Cume	0.00	0.00	0.00	
	Cume Std Error	0.00	0.00	0.00	
	Share	0.00	0.00	0.00	
	Share Std Error	0.00	-	0.00	

Specifically, in none of the survey periods for which diaries were returned did any of the diary-keepers record any viewing of WCCO-TV at all. This is the expected result where we are treating with communities more than 90 miles from the distant stations' transmitter sites. Therefore, what would be the basis for assuming that if, in the fourth survey period, there had been a diary or two in tabulation, those diaries and those alone would have reported a big enough surge in off-air viewing of WCCO-TV to justify continued significantly-viewed status? Answer: There *is* no such basis.

These considerations are noteworthy because they help to ensure the objective correctness of a determination whether significant viewing status obtains in a particular case. They give deeper evidential grounding to conclusions which are required to be empirically sound. Moreover, they magnify the visibility of error in cases where a tool of analysis, including the seemingly cut-and-dried methodology of a statistical assessment, may otherwise be used in a knee-jerk fashion. Among other benefits, this aids in forefending the possibility that a significant viewing decision will be arbitrary or irrational.

UCC's point for present purposes is *not* to remove the significantly-viewed debate to a different playing field beyond the scope of the instant case. It is rather to urge that common sense inform an assessment of the Oppositions' claims on this score. The core objective of the FCC's significant-viewing analytical model is to achieve reasonable judgments about *reality*. If United's showings were *not* valid, we should expect to find, at a minimum, a cognizable probability that WCCO-TV's over-the-air signal reached the subject communities. But the Media Bureau's own DTV reception calculations show that there is no such probability. Conversely, if UCC's showings *are* valid, then data consistent with that state of affairs would be exactly the sort of pattern we actually find in the Nielsen tables for Amboy and Hanska reproduced above. Thus the geographic realities, the Commission's contour maps, and the lack of any reported viewing of WCCO-TV in the six periods for which data were available combine to answer any question. The weight of this evidence stands as a fair substitute for the lack of diaries in the one rating period for each community.

II. Meaning of 'Network Station'

Network stations are television stations "owned or operated by, or affiliated with,"⁵ one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated

⁵ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (MM Docket No. 14-16), FCC 15-41, rel. April 2, 2015, at n. 562 ("Stations affiliated with a network may be owned and operated by the network (O&Os) or owned by other entities that have agreements with a network for distribution of the network's programming").

television licensees in 10 or more States.” 47 C.F.R. §73.3613(a)(1). At present, the FCC classifies NBC, CBS, ABC and Fox as “the four major networks.” *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (MM Docket No. 14-16), FCC 15-41, rel. April 2, 2015, at ¶¶146-147; see also, *In-State Broadcast Programming: Report to Congress* (MB Docket No. 10-238), rel. Aug. 29, 2011, at ¶ 35 and n. 115.

Historically, for purposes of the Commission’s rules on significantly-viewed stations, Fox was not viewed as one of the major networks. It should, however, be categorized in that fashion today. The reference in Section 76.5 of the Rules to “the three major national television networks” is a mere anachronism. The Rule was adopted in 1972, before the Fox Network had even been imagined as an effective competitor to CBS *et al.*

Through the years, the Commission has evolved the significantly-viewed analytical model to harmonize with commercial realities. Indeed, for at least the past three decades, virtually every Bureau decision with respect to significant viewing waivers recites this fact: “Since the Commission’s decision in *KCST-TV*, the methodology required by Section 76.54(b) for a petitioner seeking a waiver of the significantly viewed exception has evolved, pursuant to case law and market realities.” *Neuhoff Family Limited Partnership*, DA 13-1448 (released June 26, 2013).

The FCC’s original rationale for setting ABC, NBC and CBS apart, and attaching a different statistical standard to those networks, was expressly predicated on the commercial reality as it existed in that era. The *commercial reality* was the *reason* for that different standard. In recent years that reality has changed. The FCC has recognized this by repeatedly and categorically declaring Fox to be one of the “Big Four” Networks. For all purposes other than that of securing special treatment from the FCC, Fox publicly proclaims its equality with (if not superiority to) ABC, CBS and NBC. The day when special treatment for Fox could be justified for purposes of determinations of significantly viewed status is long since passed. Accordingly, the argument of Fox that KMSP-TV should be treated as an “independent” station for purposes of the determination whether it merits continued ranking as significantly viewed in the subject communities should be rejected.

III. Financial or Technical Implications of Compliance

NU Telecom asserts that it will be required to “commit significant sums to sever the New Ulm channel line-up from Searles, Essig, and Courtland.” NU Telecom Opposition at 2-3. Relatedly, CBS claims that grant of UCC’s Petition would “harm the public interest due to the technical limitations of WCCO-TV’s distribution.” CBS Opposition at 3.

The FCC consistently has rejected objections to petitions for waiver of significantly-viewed status based on these grounds. *See, e.g., CTV of Derry, Inc.*, DA 03-2936, released September 24, 2003; *WTVG, Inc. and WUPW Broadcasting, LLC*, 25 FCC Rcd 12263 (2010) (denying application for review of grant of waiver petitions – “Buckeye opposed the petitions of both WTVG and WUPW ... arguing that ... compliance with the proposed waivers would be technically infeasible due to the alleged exorbitant costs required. The Bureau considered and rejected each of Buckeye’s claims, and granted the requested waivers to the Toledo stations”); *Benedek License Corp.*, 13 FCC Rcd 15597 (1998); *Gulf-California Broadcast Co. and Journal Broadcast Corp.*, 26 FCC Rcd 15027 (2011); *Grapevine of Austin License Sub, LLC*, 15 FCC Rcd 7349 (2000); *see also, Complaint of Greater Dayton Public Television against TCI Cablevision of Ohio*, 10 FCC Rcd. 1048 (1995); *Golden Orange Broadcasting Co. v. AT&T Broadband*, 18 FCC Rcd. 4985 (2003).

Specifically, in *CTV of Derry, Inc.*, the Commission stated:

Charter maintains that it is not technically feasible to selectively control blackout for the communities supplied by its Grafton headend. However, there is a presumption that cable operators are able to purchase the equipment necessary to comply with our rules. As we stated in adopting the rules, ‘[a]lthough cable operators may have to make some changes to the way they do business, compliance costs will not be burdensome and, in any event, are outweighed by the benefits.’ *Program Exclusivity Order*, 3 FCC Rcd at 5313

In any event, UCC does not believe that any actual separation of NU Telecom’s system will be necessary as a result of a grant of the instant petition. Searles and Essig are not considered separate cable communities but are mere extensions of the New Ulm system. The FCC’s COALS system does not identify them as separate communities. NU Telecom does not give the number of its subscribers in Essig, but it cannot be substantial. Essig, located seven miles west of New Ulm, has a total 2010 census population of 14. *See*

<http://minnesota.hometownlocator.com/zip-codes/data.zipcode,56030.cfm>. There are only five occupied homes there. Assuming that three of these are served by NU Telecom and the other two by satellite carriers, it would be impossible for Nielsen to find a non-cable, non-ADS household to complete its survey.

Similarly, Searles has a census population of only 402, with a mere 176 households. Thus it is not surprising that Nielsen data for the subject periods did not include diaries from non-cable, non-ADS households in Searles. Searles is located seven miles south of New Ulm, and therefore even farther from the transmitter sites of WCCO-TV and KMSP-TV than New Ulm is. In light of the complete lack of off-air viewing of WCCO-TV and KMSP-TV in New Ulm, and considering that the FCC's own database holds that these stations have no viewable signal in Searles, it is ludicrous to assume that they actually are "significantly viewed" there at present. UCC therefore requests that the Commission treat its request as including a determination that WCCO-TV and KMSP-TV are not significantly viewed in Searles and Essig as well as New Ulm and other identified cable communities in Brown County. UCC would have listed them in the petition initially, except that NU Telecom's failure to identify these hamlets as communities served by NU Telecom in its reports to the Commission deprived UCC of any clue that it would be necessary to address them as separate from New Ulm itself.

As to Courtland (population 611, with 237 households), again the problem is NU Telecom's failure to inform the FCC of its service to that community. Courtland, in northern Nicollet County, is identified in COALS as a separate cable community. However, that is a function of its having been so reported by *Comcast*. Comcast is the only cable operator shown in COALS to be providing service to Courtland. It is well that NU Telecom is now offering service in Courtland. However, UCC doubts that the number of households served by NU Telecom there is so great that the Commission would require NU Telecom to reconfigure its system on account of a difference in significantly-viewed status of two stations. (NU Telecom has not specified how many subscribers it might have in Courtland.) Elimination of significantly-viewed status does not bar a cable operator from carrying programming of WCCO-TV, except to the extent that the local station (KEYC-TV) insists on protection under the network non-duplication and syndicated exclusivity rules.


That said, UCC plans to file a petition to seek elimination of the significantly-viewed status of WCCO-TV and KMSP-TV in Courtland shortly. Therefore, it is unlikely that the parade of horrors envisioned by NU Telecom will actually come to pass.

IV. Conclusion

"The public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows broadcasters to compete fully and fairly with other market participants." *Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5311 (1988). It would be difficult to imagine a small-market television station that has more earnestly sought to magnify its role as a steward of the local public interest than has KEYC-TV with respect to the Mankato market. Yet, for decades significantly-viewed status attached to WCCO-TV and KMSP-TV have deprived KEYC-TV of the "full opportunity to meet its public interest obligations." UCC has shown that this status is erroneous. Accordingly, its Petition for Special Relief should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2016, a copy of the foregoing "Consolidated Reply to Oppositions to Petition for Special Relief" was deposited in the U.S. mail, postage prepaid, addressed to the following:

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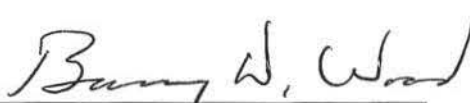
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